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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 320.

VINCENT SERMAN and LENINE STROLLO,
Petitioners,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN REPLY TO UNITED STATES' OPPOSITION.

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LENINE STROLLO,
Petitioners pro se.

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1. The Government seeks to oppose the petition on the ground that the evidence at the trial was such that acquittal is not possible because the trial testimony is of such magnitude that the newly discovered evidence becomes [illegible]. The Government [illegible] reviews [illegible] testimony [illegible] Revenue Agent Shaw,[1] but it does not weigh the value of the testimony as it appeared at the time of the trial. Paladinich testified he saw the counterfeit bills in petitioner Strollo's basement on January 3, 1963; this was refuted at the trial by the following witnesses:

1. The testimony of witness Hudak (T.R. 603, lines 19-25; T.R. 604).

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[1] An Internal Revenue agent who was part of the organized crime office, then engaged in ferreting out a solution to some eighty-eight bombings in the Youngstown, Ohio, area at the times involved in the investigation of this case.

2. The testimony of witness Pacak (T.R. 697, lines 16-25; T.R. 700, lines 1-5, 13-25; T.R. 701, lines 1-10, 15-18).
3. The testimony of witness Armstrong (the admitted accomplice of John and Joseph Paladinich) (T.R. 725, 726, 727, 728, 729, 735, 739, 740, 741, 742, 743).

The newly discovered evidence directly attacks and refutes Paladinich's story and proves him to be the producer and caretaker of the counterfeit bills and paraphernalia, along with the accomplice, not known at the time of trial, one Raymond Socie; the latter being the person that Agent-Detective Bernat[2] took a statement from and suppressed same.

The Government does not in any way attack the requisites for newly discovered evidence under Rule 33;[3] the Government attacks only on the last of the criteria set forth as the basis for a new trial under the Rule, viz., can the newly discovered evidence produce an acquittal if a new trial were ordered? Petitioners submit that they have met all such requisites and further show that suppression of evidence played a vital role in the Government's case. Petitioners submit that they are not dealing with mere error of law occurring in the course of pre-investigation and trial which can be disregarded as harmless. It may not be amiss to remind that the question is not whether

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[2] See page 7, Government's brief. The Government would have the Court believe that Bernat was some obscure city policeman; the fact is that he was directly connected with the investigation of this case from the very beginning (T.R. 287, 288); the testimony by John Paladinich (20a) and Mrs. Socie (34a-44a) show in part how Bernat was deeply involved in the original investigation of this matter.

[3] It should be recalled that when the motions for new trial were filed in the District Court, the Government never denied or opposed the facts asserted in the motions, supporting affidavits or supporting sworn statements.

guilt may be spelled out of the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in Federal courts. (*Cf. Wrightson v. United States*, 222 F. 2nd, at page 561; *Bollenbach v. United States*, 326 U.S. 607).[4]

The testimony of Agent Shaw is beyond belief when the record is examined. To believe that Serman, a practicing lawyer, would make such statements in a public place (if he were criminally involved) is indicative of either misunderstanding or effort to bolster manufactured evidence —even so, why, if the Government's position is correct, that is, if they rely on the truthfulness of witness Paladinich's testimony,[5] would Serman be making such statements on January 25, 1963, as stated by Agent Shaw?[6]

Furthermore, if the Government's position, as stated in its brief at page 6, "Paladinich found a temporary storage place for what might have been some of the printing paraphernalia, and that he gave to Socie, as well as to his brother, some of the notes obtained from petitioners on the night of January 3, 1963," is correct, would the comments charged to Serman be necessary if all such were true? Therefore, far from being "peripheral and immaterial" the newly discovered evidence and the suppressed evidence is vital, and would, without question, cause a

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[4] The cases deal with misdirection of a jury by the trial judge after submission of the case; this was the subject of prior appellate action in the instant case; it is here argued that the language in the *Wrightson* case is most appropriate for the position taken by the Government at this time.

[5] That Paladinich saw counterfeit bills in petitioner Strollo's basement on January 3, 1963.

[6] Agent Shaw's testimony melts away, upon a study of the record (T.R. 216), Shaw saying he overheard petitioner Serman say *on a telephone* "We can handle all you want," as against the testimony of Government witness, Joseph Paladinich, who testified Agent Shaw did not enter the restaurant until *after* the said telephone call was made. (T.R. 166, lines 24, 25; T.R. 167, lines 1-25.)

verdict of not guilty to be returned if the jury were to hear the true facts. (*Mesarosh v. United States*, 352 U.S. 1; 1 L. ed. 2d 1 (1956).)[7]

Mesarosh v. United States, 352 U.S. 1; 1 L. ed. 2d 1, headnote 6:

> "On admission by the government, following a conviction of several defendants in a prosecution for crime in a federal court, that certain of the government testimony was tainted, the district judge is not the proper agency to determine that there was sufficient evidence at the trial, apart from the tainted portion thereof, to sustain a conviction of any of the defendants, since only the jury can determine what it would do on a different body of evidence; in this situation, if the case should be remanded to the District Court and that court should rule that the verdict against some of the defendants could stand, the United States Supreme Court, on a subsequent appeal, would be obliged to reverse and direct that a new trial be granted."

Hence, in response, what could be more relevant than the matter asserted and supported by affidavits, sworn statements and transcripts of official Federal Court proceedings?

The Government, on page 7 of its brief in opposition in this Court, states, "There is nothing to indicate, however, that the government had offered to make such a recommendation as an inducement for the brothers' (John and Joseph Paladinich) testimony at trial." (T.R. 88.) When asked if he had talked to Treasury agents on whether or not his brother, Joseph Paladinich, could get probation, the witness answered, "I don't recall doing so."

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[7] The proper agency to determine whether it was sufficient evidence at the trial to sustain a conviction of either of petitioners can only be determined by a jury; the jury can no longer act in the instant case, as was the situation in the *Mesarosh* case.

Factually, he reiterated that statement twice! Hence, far from being a positive denial of an intimation of probation for the witness' services, the Government must rest on its witnesses' statements, "I don't recall." The Government must rely on the transcript of the record of the proceedings before District Judge Ben C. Green on February 21, 1963 (see Appendix 50a), as to Joseph Paladinich's arraignment and plea of guilty and (Appendix 51a) as to John Paladinich's arraignment and plea of guilty showing preferential treatment over other defendants arraigned at the same proceedings; further, the transcript of sentencing proceedings (Appendix 55a) before District Judge Ben C. Green on September 20, 1963, approximately two months after the trial date, clearly shows the ultimate in preferential treatment for services rendered by granting probation for both men under the circumstances. (The District Judge was acceding to the wishes of the Secret Service and the District Attorney. That record so shows.)

It should be noted at this point that the trial judge (District Judge Girard Kalbfleisch) would not have before him the transcript of the two proceedings, viz., February 21, 1963 and September 20, 1963, when he summarily overruled the motions for new trial. The petitioners had requested an oral hearing on the motions for new trial for the purpose of presenting testimony and evidence such as the transcripts of the pleas and sentencing hearings of the Government witnesses.

This Honorable Court held in *Gordon v. United States*, 344 U. S. 414, 97 L. ed. 447 (1952), headnote 9:

> "It is error for the trial judge at a federal criminal trial to exclude, as immaterial, a transcript of separate criminal proceedings against a government witness, an alleged participant in the crime, from which it appears that the judge, in accepting the witness' plea of guilty, admonished him to 'tell the probation

authorities the whole story even though it might involve others,' where the government relied principally upon the witness to implicate the defendants, and the witness, at the time of the trial and nine months after pleading guilty, was still unsentenced."

2. With reference to wiretapping or electronic eavesdropping of petitioner Serman's office, completely denied in the brief for the United States, leaves the petitioners nonplussed for the reason that Government agents were found on the roof of the building in which petitioner's office was located. However, we must assume under the policy set forth in the supplemental memorandum in *Schipani v. United States*, No. 504, October Term, 1966, 385 U.S. 372, that no agents of the Government were found on the roof of that building and that the local authorities must be in error in determining that the persons found on the roof of that building with wire and wire tools were Government agents, or must we more properly say under *Schipani* that wiretapping and electronic surveillance, even though involving trespass or breaking and entering by Government agents, is to be commended in all situations where the victim cannot show that the Government did not gain a proven particular advantage of a proven particular set of facts with reference to a particular offense on a particular day.

CONCLUSION.

The writ of certiorari should issue from this Court to the United States Court of Appeals, Sixth Circuit, on the petition for a writ of certiorari filed by petitioners in this case. The reasonings contained in the brief for the United States in opposition to these petitioners, seem inadequate and show no justification for the summary overruling of the motions for new trial by the District Court.

Respectfully submitted,

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